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IN THE

Supreme Court of the United States

October Term, 1961

No. 483

JOHN J. CASALE, INC.,

Appellant,

AGAINST

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,

Appellees.

JURISDICTIONAL STATEMENT

On Appeal From the Judgment of the United States District Court, Southern District of New York

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INDEX

	PAGE
Opinion Below	2
Jurisdiction	2
Questions Presented	2
Statutes Involved	3
Statement	3
Substantial Questions Are Presented	5
Conclusion	19
Appendix A	21
Appendix B	32

CASES CITED

American Trucking Associations, Inc. v. United States, 364 U. S. 1 (1960)	9
Atchison, Topeka and Santa Fe Railway Co., et al. v. United States, et al., —— F. Supp. ——, D. C. Ill., 1962	10
Beaumont S. L. & W. Ry. v. United States, 282 U. S. 74 (1930)	10

	PAGE
Center American Corporation—Investigation of Operations, MC-C-3079, 15 Fed. Car. Cas. ¶35,389	11
Church, H. B., Truck Service Co., 27 M. C. C. 191	19
Commercial Zones—Terminal Areas (54 M. C. C. 21)	4
Florida v. United States, 282 U. S. 194 (1931)	2
Hearst Publications v. National Labor Relations Board, 136 F. 2d 608, C. A. 4, revs'd on other grounds, 322 U. S. 111 (1944)	17
R. & H. Rittenhouse, d b a Roy Rittenhouse—Investigation and Revocation of Certificate, MC-C-2106, 78 M. C. C. 389	12
Schenley Distillers v. United States [326 U. S. 432 (1946)]	4
Secretary of Agriculture v. United States, 347 U. S. 645 (1954)	11
Securities and Exchange Commission v. Chenery Corporation, 318 U. S. 80 (1943)	9, 11
Schaffer Transportation Company etc. v. United States, 355 U. S. 83 (1957)	10
Universal Camera Corporation v. National Labor Relations Board, 340 U. S. 474 (1951)	2, 12
United States v. Chicago Milwaukee St. Paul & Pacific Railroad Company, 294 U. S. 499 (1935)	10
United States v. Drum, 368 U. S. 370 (1962)	3, 5, 6, 8, 9, 11, 12, 13, 19

PAGE

United States v. Pierce Auto Freight Lines, 327 U. S. 515 (1946) 2, 9

United States v. Silk, 331 U. S. 704 (1947) 17

United States v. L. A. Tucker Truck Lines, Inc., 344 U. S. 33 (1952) 2

Willapoint Oysters, Inc. v. Ewing, 174 F. 2d 676, cert. den. 338 U. S. 860 (1949) 12

STATUTES CITED

Title 28, U. S. C.:

Sections 1336, 2321-2325 2

Section 1009 2

Section 1253 2

Section 2101(b) 2

49 U. S. C.:

Section 309 4

Section 303(a)(17) 4

Motor Carrier Act of 1935 (Ch. 498, 49 Stat. 543) 6

Vehicle and Traffic Law of the State of New York, Article 6, Section 310 et seq. 14

AUTHORITIES CITED

	PAGE
I. C. C. Bureau of Transport Economics and Statistics, Gray Area of Transportation Operations, Statement No. 6010, 1960	6
12 Pike and Fischer, Admin. Law (2d) 645	10
Dodd, The Chenery Case, 56 Harv. L. Rev. 1002 (1943)	11
Explanation of the Development of Motor Carrier Costs with Statement as To Their Meaning and Significance, I. C. C. Bureau of Accounts, Cost Finding and Valuation, Statement No. 4-59, 1959	13

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JURISDICTIONAL STATEMENT

ON APPEAL FROM THE JUDGMENT OF THE UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

John J. Casale, Inc., appellant herein, appeals from the judgment of the United States District Court for the Southern District of New York, entered on April 9, 1962, dismissing its amended complaint in an action to set aside a final order of the Interstate Commerce Commission ("Commission") and respectfully submits that substantial questions are presented by this appeal which merit review and decision by this Honorable Court.

Opinion Below

The opinion of the three-judge District Court for the Southern District of New York is reported in —— F. Supp. —— (S. D. N. Y., 1962) and is annexed hereto as Appendix "A". The report of the Commission (Division 1) is published in 14 Fed. Carr. Cas. ¶35,244 and is annexed hereto as Appendix "B".

Jurisdiction

This suit was instituted under Title 28 U. S. C. Sections 1336, 2321-2325 and Title 5 U. S. C. Section 1009 to set aside a final order of the Commission. The judgment of the United States District Court for the Southern District of New York was entered on April 19, 1962, and a notice of appeal was filed in that Court on June 13th, 1962.

The jurisdiction of the Supreme Court to review this decision by direct appeal is prescribed by Title 28, U. S. C. Sections 1253 and 2101(b) and is confirmed by *United States* v. *L. A. Tucker Truck Lines, Inc.*, 344 U. S. 33 (1952); *United States* v. *Pierce Auto Freight Lines*, 327 U. S. 515 (1946); and *Florida* v. *United States*, 282 U. S. 194 (1931), among other decisions.

Questions Presented

This case raises two major questions: one concerns the appropriate scope of review by a statutory three judge District Court of orders of the Interstate Commerce Commission which *Universal Camera Corporation* v. *National Labor Relations Board*, 340 U. S. 474 (1951) did not reach; and the second involves a reappraisal of this Court's de-

cision in *United States* v. *Drum*, 368 U. S. 370 (1962) in terms of a case which is not marginal (see concurring opinion by Mr. Justice Douglas, 368 U. S. 370 at p. 386).

Simply stated, the questions are these:

1. Where the Commission finds only that a lease of equipment with drivers does not vest such control in the lessee as to constitute private carriage and no reference is made to the "burden of transportation" test enunciated by this Court in *United States* v. *Drum*, *supra* and the Commission neither relies upon that test nor makes any findings relating to it may the District Court, without remanding the case to the Commission, sustain the Commission's order exclusively on the basis of that test?

2. Assuming *arguendo* that the "burden of transportation" test was implicit in the Commission's report, was it satisfied where, as in the case at bar, the traditionally basic costs of transportation were borne by the lessee.

Statutes Involved

This case involves Sections 203(a)(14), 203(a)(15), 203(a)(17) and Section 209(a)(1) of the Act., [49 U. S. C. 303(a)(14), 303(a)(15), 303(a)(17), 309(a)(1)] and these are set forth in the opinion of the Court below (Appendix, A, pp. 21-24).

Statement

The appellant is regularly engaged in the business of leasing motor vehicle equipment to various companies which transport their own merchandise (a) beyond the New York City Commercial Zone (herein called the "Commercial Zone") as defined by the Commission in *Commer-*

cial Zones—Terminal Areas, (54 M. C. C. 21) with their drivers who are carried on the lessee's payroll (b) within the Commercial Zone either on lessee's or appellant's payroll.

On May 24, 1960, appellant filed an application under Section 209 of the Act (49 U. S. C. Section 309) for a Permit as a contract carrier authorizing operations in interstate or foreign commerce with motor vehicles leased to shippers and operated by drivers on appellant's payroll. Consistent with the procedure suggested by *Schenley Distillers v. United States* [326 U. S. 432 (1946)] appellant moved to dismiss the application on the ground that the proposed operations were not subject to the jurisdiction of the Commission in that they constituted private carriage conducted by the lessees [49 U. S. C. 303(a)(17)].

The Examiner to whom the application was referred held that the leasing program which appellant proposed constituted regulated carriage; that part of the present operations within the Commercial Zone conducted by drivers on appellant's payroll was unlawful; and that appellant's alternative request for a Permit as a contract carrier should be denied.

Exceptions to the Examiner's Report and Recommended Order were filed by appellant and protestants replied thereto. On August 28, 1961, the Commission (Division 1) served its report and entered its order, dated August 21, 1961, in which it concluded:

> "We find that the applicant's proposal to lease vehicles and drivers, under the circumstances set forth herein, to lessees for operation beyond the New York Commercial Zone, constitutes the tendering of a for-hire service for which authority

from the Commission is required, and is not bona fide private carriage by lessees. The motion to dismiss is denied" (Appendix B, p. 46).

But the Commission did not adopt the Examiner's finding that the operations within the Commercial Zone conducted by drivers on appellant's payroll was illegal. Appellant then instituted an action in the District Court to set aside the Commission's final order, but did not challenge the denial of the Permit. The three judge District Court dismissed the complaint, holding that the appellant had failed to meet the "burden of transportation" test described in *United States v. Drum, supra*, notwithstanding that this issue had neither been presented to, nor decided by, the Commission.

The District Court's suggestion that the Commission did not rely solely upon the driver control issue but looked to the "totalities of the situation" (Appendix A, p. 31) in reaching its decision is a *carcat* contradicted by the Commission's report. The Commission considered only the control issue and since the Court below did not sustain the Commission's order on that issue but upon a ground not considered or reached by the Commission the judgment below must be reversed and the order of the Commission should be vacated.

Substantial Questions Are Presented

Although the function of a reviewing court has been spelled out by this Court, again and again, the District Court elected to disregard the lesson and proceeded to amend the Commission's report by adding findings which the Commission did not make. Hence, this case poses a question of major significance in administrative law, namely, whether a court which reviews an order of an

administrative agency may independently search a record to support a decision upon principles which were not relied upon by the agency.

The second question involves a consideration of the so-called "gray areas" of transportation which have concerned the Commission and Congress [I. C. C. Bureau of Transport Economics and Statistics, *Gray Area of Transportation Operations*, Statement No. 6010, 1960] since the enactment of the Motor Carrier Act of 1935 (ch. 498, 49 Stat. 543). No single facet of this broad problem is so complex and so important as the legality of leasing arrangements. Leasing is widespread and involves tens of millions of dollars of equipment and revenues and is a source of substantial employment, both direct and indirect, in motor and rail transportation. Unfortunately, the miscellany of decisions by the Commission has failed to mark out the channels of lawful conduct and this void was not filled (indeed, it appears to have been broadened and deepened) by this Court's decision in *United States v. Drum, supra*. Hence, this case presents the occasion for determining the limits, if any, upon the Commission's power to adopt tests governing leasing arrangements and, if there is such a boundary, the circumstances under which a lease of equipment with drivers may constitute private carriage or, if this be the law, a plain and unequivocal declaration that there can never be private carriage so long as the lessor of the equipment supplies drivers.

1. The appellant sought to establish that the operations to be conducted with vehicles it leased to shippers would constitute private carriage irrespective of the fact that the drivers were on its payroll and the Commission defined the principal issue to be:

> "whether the leasing of vehicles, with drivers who would be employees of applicant, to a lessee for

> operation beyond the New York commercial zone constitutes for-hire carriage subject to regulation by the Commission." (Appendix "B", p. 34).

The Commission concluded that control over the physical transportation would not be vested in the lessees (Appendix "B", p. 43).

Contrary to the Court's suggestion, the Commission did not look "at the totalities of the situation" (Appendix A, p. 31) and it did not consider the "burden of transportation" or any standard other than "control". That the Commission's decision rested squarely and exclusively upon the control issue[1] is made evident by the statement that:

> "In H. B. Church Truck Service Co., Com. Car Application 27 M. C. C. 191, cognizant that the facts involving particular leasing operations are peculiarly within the knowledge of the parties thereto, former Division 5 held that where a driver is in the employ of the lessor, this fact creates a rebuttable presumption that the lessor is engaged in for-hire carriage." (Appendix B, p. 37.)
>
> . . . . . .
>
> "In view of the agreement of the parties on the applicable law, the only question is whether the applicant has overcome the presumption which the Church case requires it to overcome." (Appendix B, pp. 37-38.)

The reason why the Commission did not address itself, in this case, to the so-called "burden of transportation"

[1] It will be shown in this Jurisdictional Statement that the Commission's determination of the control issue was not supported by substantial and probative evidence of record, and the significant fact is that the Court below did not sustain the Commission on this issue.

is plain. On August 15, 1960, the United States District Court for the Western District of Oklahoma had rejected the test of "burden of transportation" (193 F. Supp. 275, 1960) and the decision by this Court had not then been announced. The Commission, therefore, abandoned this criterion in the consideration of the case at bar and, instead, bottomed its determination exclusively upon the question of control. There was neither explicit nor implicit recogniton of, or reliance upon, the "burden of transportation" test. Now, when the three judge District Court reviewed the order of the Commission in this case, it concluded that the decision by the Supreme Court in the *Drum* case, *supra*, was controlling and for that reason "the action of the Commission must be affirmed" (Appendix A, p. 27) even though the "burden of transportation" factor was not involved in the instant case. The reviewing Court committed error when it based its decision on *Drum, supra* and it incorrectly held that the "basic facts" in this case "are not markedly different from those in *United States* v. *Drum*" (Appendix A, p. 29).

The inescapable fact is that the Court below ruled against the Commission on the control issue (Appendix A, p. 30). If the Commission's determination on control had been supported by substantial evidence, this ground, alone, would have been sufficient to warrant affirmance of the Commission's order without resort to the "burden of transportation" test since this Court, in the *Drum* case, *supra* did not reject the control test. Simply stated, the decision of the Court below must be reversed because it relied upon its own construction of the record and substituted its judgment for that of the Commission by adding its own arbitrary finding that the "burden of transportation" test had not been satisfied.

This is not a case of a Court articulating its "plotting of the boundary between private and regulated carriage

* * * in terms of over-all substance" (*United States* v. *Drum*, *supra*, fn. at p. 384); it is plainly a case of constructing a boundary which the Commission had not elected to create. In so doing the Court below violated the well settled mandate that:

> "* * * The function of the reviewing court is * * * limited to ascertaining whether there is warrant in the law and the facts for what the Commission has done. Unless in some specific respect there has been prejudicial departure from requirements of the law or abuse of the Commission's discretion, the reviewing court is without authority to intervene. It cannot substitute its own view concerning what should be done, whether with reference to competitive considerations or others, for the Commission's judgment upon matters committed to its determination, if that has support in the record and the applicable law." [United States v. Pierce Auto Freight Lines, 327 U. S. 515, 536 (1946).]

A review is not a trial *de novo;* a three judge District Court is limited to the Commission's express holding and it cannot supply findings which the Commission did not make.

In *American Trucking Associations, Inc.* v. *United States*, 364 U. S. 1, 15-17 (1960), this Court pointed out that where the Commission assigned a single reason for its action, a construction of the Interstate Commerce Act could not be sustained upon the basis of an interpretation upon which the Commission did not rely in its report and, therefore, the case had to be remanded to the Commission for further proceedings so that the seminal facts could be determined and the relevant principles applied [*Securities and Exchange Commission* v. *Chenery Corporation*,

318 U. S. 80 (1943); *Atchison, Topeka and Santa Fe Railway Co., et al.* v. *United States, et al.*, ... F. Supp. ..., D. C. Ill., 1962, 12 Pike and Fischer, Admin. Law (2d) 645, 654]. This must be done in this case because the Supreme Court "must know what a decision means" before it can say whether the Commission was "right or wrong". *United States* v. *Chicago Milwaukee St. Paul & Pacific Railroad Company*, 294 U. S. 499, 511 (1935).

In *Beaumont, S. L. & W. Ry.* v. *United States*, 282 U. S. 74, 86 (1930), this Court pointed out:

> "... Complete statements by the Commission showing the grounds upon which its determinations rest are quite as necessary as are opinions of lower courts setting forth the reasons on which they base their decisions in cases analogous to this."

In *Schaffer Transportation Company etc.* v. *United States*, 355 U. S. 83, 88 (1957), Mr. Chief Justice Warren, speaking for the Court stated:

> "Of course, the Commission possesses a 'wide range of discretionary authority' in determining whether the public interest warrants certification of any particular proposed service. *United States* v. *Detroit & C. Nav. Co.*, 326 U. S. 236, 241, 90 L. ed. 38, 42, 66 S. Ct. 75; *Interstate Commerce Com.* v. *Parker*, 326 U. S. 60, 89 L. ed. 2051, 65 S. Ct. 1490. But that discretion must be exercised in conformity with the declared policies of the Congress. To see whether those policies have been implemented we look to the Commission's own summary of the evidence, and particularly to the findings, formal or otherwise, which the Commission has made."

Mr. Justice Frankfurter, in a separate opinion, pointed out:

> "It is, however, pertinent to add that the Court's decision may serve a useful purpose if it will lead the Interstate Commerce Commission, despite its enormous volume of business, to a more detailed and illuminating formulation of the reasons for the judgment that it reaches even in that class of cases where Congress has relied on the Commission's discretion in enforcing the most broadly expressed congressional policy. Since the orders in such cases also fall under judicial scrutiny, it is desirable to insist upon precision in the findings and the reasons for the Commission's action" (p. 95).

Since it is clear that the Commission did not rely upon the "burden of transportation" test, its order must be set aside [*Secretary of Agriculture v. United States*, 347 U. S. 645 (1954); *S. E. C. v. Chenery Corp.*, 318 U. S. 80 (1943); *Dodd, The Chenery Case*, 56 Harv. L. Rev. 1002 (1943)].

2. Assuming *arguendo*, that the "burden of transportation" test was implicit in the Commission's report, this standard was, in fact, satisfied. The burdens of the transportation business, according to this Court, consist of a large capital investment in equipment and the "risk of * * * premature depreciation or catastrophic loss * * * the risk of a rise in variable costs such as fuel, repairs and maintenance * * * living expenses * * * the risk of non-utilization of high priced equipment" (*United States v. Drum*, *supra*, at pp. 379-380; *Outer American Corporation—Investigation of Operations*, MC-C-3079, 15 Fed. Car. Cas. ¶35,389).

A determination in this case that the shippers did not bear the characteristic burdens of transportation would

be contrary to the record. Even if there were some evidence that a part of the risk was shared by shippers, this would not be sufficient:

> "Even though a portion of an order, lifted from context, may be supported, we think it may be extremely arbitrary, capricious and unreasonable when examined in the light and against the background of the order's entire effect" [*Willapoint Oysters, Inc. v. Ewing*, 174 F. 2d 676, 697, cert. den. 338 U. S. 860 (1949)]; cf. *Universal Camera Corp. v. N. L. R. B.*, *supra*.

There is one inescapable fact in this case: the economic arrangement between appellant and shippers concerning the use and operation of leased vehicles is exactly the same whether or not drivers are on appellant's payroll or on the payroll of the shipper.

The Commission has never held that a shipper must own equipment in order to qualify as a private carrier. Thus, if a shipper leased equipment from appellant and hired a driver from a third source not related to appellant, it would be clear that the shippers would be private carriers (*R. & H. Rittenhouse, d b a Ron Rittenhouse Investigation and Revocation of Certificate*, MC-C-2106, 78 M. C. C. 389) even if the shipper paid a premium to the person who provided the labor. In the case at bar, where the appellant provides drivers, appellant receives only the actual out-of-pocket labor costs and no profit is earned nor is a premium received. In other words, the shipper pays as wages, exactly what his costs would be if the driver were on his payroll. To conclude that the burden of the transportation risks has shifted to appellant because it acts as paymaster is to distort the principles enunciated in the *Drum* case, *supra*. In other words,

if the drivers were not on appellant's payroll, it would be perfectly clear that the lease of the equipment under the very terms which are in effect between appellant and the shippers would not derogate from the private carrier status of the shipper. The mere fact that the drivers are on the appellant's payroll but are subject to the direction and control of the lessee, does not amount to an assumption of the burden of transportation so as to convert private carriage into regulated transportation.

Contrary to the determination of the Court below, the facts in this case are different from those in the *Drum* case, *supra*, because in the latter case owner-operators were involved to whom no wage payments were made and this Court did not find that the burden of transportation risks had shifted to the owner-operators because of the element of wage payments since there was no such factor as wages in that case.

The burdens of the transportation business are reflected in traditional cost factors, namely, variable costs, constant costs and joint costs (*Explanation of the Development of Motor Carrier Costs with Statement As To Their Meaning and Significance*, I. C. C. Bureau of Accounts, Cost Finding and Valuation, Statement No. 4-59, 1959). In the instant case the record showed that the shipper-lessees assumed all of the costs and expense of operations, including the total of direct labor costs and although the leased vehicles were maintained by appellant, the rentals included that cost in the same manner as if a public garage had been engaged by the shipper to service equipment on a fee basis.

The record showed, too, that all permits and licenses required for the use and operation of the vehicles (except the registration fee for the vehicle) are obtained and paid for by the lessee and that the lessee pays all sales, privi-

lege or other taxes or charges levied in connection with the rental, use or operation of the vehicles. Further, the lessee is required to pay or reimburse appellant for any fines imposed by any public authority as a result of overloading the vehicles and is liable for any damage to the vehicle occasioned by overloading. The lessee, and not appellant, is responsible for any fines imposed upon drivers of the vehicles, whether they are on the payroll of appellant or of the lessee.

The lessee obtains cargo insurance and appellant is absolved of any responsibility for any loss or damage to any merchandise left or transported in the leased vehicle (paragraphs XII of Exhibit 8). Although the appellant procures public liability and property damage insurance under standard policies this procedure is followed because under New York State law (and not as an incident of a common carrier's obligations) appellant is liable for personal injuries and property damage arising from the operations of the leased equipment (*Vehicle and Traffic Law of the State of New York, Article 6, Section 310 et seq.*). Since, however, the lessee must pay its proportionate share of the premium cost, the lessee does, in fact, provide public liability insurance if he does not exercise the option to obtain its own public liability insurance directly (Paragraph XIV of Exhibit No. 8).

Drivers' wages and all fringe benefits are borne by the lessee (even if the driver is carried on appellant's payroll) because the lessee reimburses appellant for the precise labor costs the lessee would incur if the driver were on its payroll.

If the lessee to whom a driver is permanently assigned does not have sufficient work available the cost of unproductive time is imposed upon the lessee because the driver is not assigned to another task.

3. Concededly, a showing of some control by the shipper does not establish private carriage. In this case, the Commission found that the lessees did have physical control of the movement of the vehicles but concluded, contrary to the record, that the ultimate control was vested in the appellant. This finding was not affirmed or adopted by the Court below. In any case, the record shows that the drivers were regarded and treated as the lessees' employees. To begin with, they are members of various local unions of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. Appellant does not have a general collective bargaining agreement with one local union covering all chauffeurs (Tr. 35).[2] Instead, a separate labor agreement is entered into by appellant as agent and for the account of each lessee, covering only those drivers who work for the latter (Tr. 100-101, 289) so that each labor agreement provides that it is applicable exclusively to the equipment leased to the named lessee. Indeed, no union contract is signed by appellant unless it is approved by the lessee (Tr. 29-30). Each agreement terminates immediately upon the expiration of the lease (Tr. 32) and the drivers then follow the job so as to become either the direct employees of the lessee (if the latter commences to utilize its own equipment) or the employees of any other company which may later supply motor vehicle equipment to the lessee (Tr. 34). Conversely, when appellant enters into a new agreement to lease equipment with drivers to a company which previously owned its own equipment, the drivers are placed on appellant's payroll. The identical collective bargaining agreement is operative whether the driver is on appellant's payroll or is carried on the lessee's payroll (Tr. 49-50).

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[2] References to "Tr." is to the transcript of the hearing before the Commission's Examiner.

The Commission found that "* * * applicant is a significant factor in the procurement of drivers' for the lessees" but the fact is that appellant's function is limited. In every instance, a proposed driver is carefully screened and approved by the lessee before being assigned to operate equipment under lease to the lessee (Tr. 173). If the lessee finds the driver's service deficient, a new driver is provided, subject to the lessee's approval. (Tr. 368). What is significant, obviously, is the control over the driver while he is driving the leased vehicles rather than who recruited him. Since, as found by the Commission, it is the lessee "who does the actual hiring", appellant's initial contacts with the drivers cannot afford a rational basis for a finding that appellant controls the subject transportation.

The long and short of it is that essential employment rights, benefits and privileges of drivers are determined by the lessees and not by appellant: a driver is assigned permanently and exclusively to the equipment leased to the particular lessee (Tr. 161-162) and if the lessee has no work available for several days, the driver is not transferred for that period to operate equipment leased to another shipper (Tr. 44, 146, 366-367); and seniority rights are "job-wide", i.e., appellant does not have one over-all plant-wide seniority list. Thus, a driver for Ditto, Inc. (a representative lessee) will not and cannot be used by appellant for the operation of a vehicle leased to Bethlehem Steel, another lessee, and drivers who are on appellant's payroll and work only in the Commercial Zone cannot be employed interchangeably by various lessees, except in rare emergencies (Tr. 44, 146, 162, 370, 371). Simply stated, the bundle of rights which distinguishes an employee from an independent contractor are created and perpetuated by the lessee and not appellant. The status of employer-employee is not determined by the fact that wages are paid by a particular individual:

the pertinent inquiry must be directed to the question of control ovr the activities of the employee [*Hearst Publications* v. *National Labor Relations Board*, 136 F. 2d 608, C. A. 4, revs'd on other grounds, 322 U. S. 111 (1944); *United States* v. *Silk*, 331 U. S. 704 (1947)].

The Commission speculated that because the "* * * lessees would prefer to be relieved of the responsibility of carrying drivers on their payroll" the proposed arrangement "* * * will relieve the lessees of any responsibility as employers over their driver." This supposition is contrary to the evidence of record. Each lessee unequivocally testified that when he leased a vehicle, with or without a driver, he exercised the identical control over the driver and the transportation.

It is the lessee who is, in fact, responsible to the drivers and it is clear that appellant has neither agreed to assume control nor assumed control over the drivers and the transportation; it is the lessee who instructs the drivers and directs their activities; and it is the lessee and not appellant who bears all the expenses or costs involved in the conduct of the driver and the attendant risks of transportation, including any fines incurred by the driver of the vehicle.

In all cases, irrespective of whether or not the driver is on appellant's payroll, the transportation activity is directed exclusively by the lessee.

Evidence as to the exercise of control or discretion over drivers (whether they were on appellant's or lessee's payroll) was provided by the testimony of three representative drivers who appeared at the hearing and affirmatively stated that they are subject only to the control and direction of the lessees and that appellant never interferes with or directs their activities while they are engaged in the business of the lessees (Tr. 91,

131, 188, 202-204, 213, 224, 261). Thus, whether equipment is leased with or without drivers; drivers report at the start of the day to appellant's garage where the lessee's equipment has been serviced and they are required to punch a time clock at the garage when they check in and out (Tr. 22). If the driver is on the lessee's payroll, time cards are forwarded to the lessee at the end of the week (Tr. 23). Once having reported, the driver proceeds to the premises of the lessee where he receives his instructions with respect to the operations of the equipment during the day. At no time during any single day, does appellant know the location of its equipment, whether it be leased with or without drivers (Tr. 46-47). Moreover, appellant has no knowledge as to the amount or nature of the contents transported in the leased equipment.

The Commission apparently recognized that the question of for-hire transportation does not exist where drivers are on the lessee's payroll. Since as the evidence shows, the actual operations of trucks is no different when the drivers are on appellant's payroll, it must follow that for-hire transportation does not exist in such a case.

The Commission also stated that:

> "It is true that in such matters as loading of vehicles, scheduling of departure, and routing of traffic the lessees exercise complete control. But we do not attribute to this the all-important significance which applicant does. The lessee's control in this respect must be considered from the standpoint of the control which a shipper using for-hire carriage exercises over its traffic. It is not at all unusual for shippers to oversee the loading, arrange the departure and even select the route

over which the vehicle is to move. Carriers engaged in for-hire transportation perform a service which to a considerable degree is tailored to the shippers' requirements. So, considered, we do not believe that the lessee's control over the physical transportation is so different as to warrant a finding that it is engaged in bona fide private carrier transportation" (Appendix B, p. 43).

But these conclusions are not based upon evidence of record. On the contrary, the record refutes the Commission. The uncontradicted fact is that the operation with leased vehicles does not involve any of the elements which inhere in regulated carriage service: a for-hire carrier knows the location of his equipment at all times, and appellant does not; neither drivers nor vehicles are permanently assigned by for-hire carriers to a particular shipper as they are in this case; drivers remain on the payroll after the loss of an account, whereas here the driver follows the shipper; the carrier earns a profit on wage costs, but appellant does not; drivers report to the common carrier for work and do not receive instructions from the shippers; and the common carrier controls the entire transportation service performed for the shipper.

Conclusion

Appellant submits that if the substance of its present and proposed leasing arrangement is considered, it must be concluded that the transportation involved is private, rather than for-hire, and accordingly, the Commission's decision was arbitrary and capricious. Appellant has overcome the presumption of the *Church* case (*H. B. Church Truck Service Co.*, 27 M. C. C. 191) and consistent with the Court's decision in the *Drum* case, *supra*,

has demonstrated that the proposed transportation will be private carriage. At the very least, this case should be remanded to the Commission for further evidence as to the assumption of the burdens of transportation.

Appellants believe that the questions presented by this appeal are substantial and of importance not only to the public generally, but to the Interstate Commerce Commission and those who are regulated by, and practice before, that agency.

Respectfully submitted,

HERBERT BURSTEIN,
Attorney for John J. Casale, Inc.,
Appellant.

October 3, 1962.

APPENDIX A

Opinion

Levet, D. J.

This is an action brought to review an order of the Interstate Commerce Commission (referred to herein as the "Commission") in John J. Casale, Inc., Contract Carrier Application, Docket No. MC-20314 (Sub. No. 1). The Commission determined that plaintiff's proposed operation, whereby plaintiff would lease motor vehicles, with drivers who would be plaintiff's employees, to lessees for operation beyond the New York Commercial Zone, would constitute for-hire carriage for which appropriate authority is required from the Commission; and that plaintiff's application for such authority should be denied. In its complaint, plaintiff does not challenge the denial of operating authority. Rather, it challenges only the conclusion of the Commission that the proposed operation would constitute for-hire carriage.

Subsequent to the filing of the complaint in this case, the Supreme Court issued its opinion in United States v. Drum, 368 U. S. 370 (1962). Based on this Supreme Court decision, which in our opinion is controlling, the action of the Commission must be affirmed.

Statutes Involved

This case involves Sections 203(a)(14), 203(a)(15), 209(a)(1), and 203(a)(17) of the Interstate Commerce Act, 49 U. S. C. 303(a)(14), 303(a)(15), 309(a)(1) and 303(a)(17).

Section 203(a)(14) defines common carrier by motor vehicle as follows:

> "The term 'common carrier by motor vehicle' means any person which holds itself out to the gen-

eral public to engage in the transportation by motor vehicle in interstate or foreign commerce of passengers or property or any class or classes thereof for compensation, whether over regular or irregular routes, except transportation by motor vehicle by an express company to the extent that such transportation has heretofore been subject to chapter 1 of this title, to which extent such transportation shall continue to be considered to be and shall be regulated as transportation subject to chapter 1 of this title."

Section 203(a)(15) defines contract carrier by motor vehicle as follows:

"The term 'contract carrier by motor vehicle' means any person which engages in transportation by motor vehicle of passengers or property in interstate or foreign commerce, for compensation (other than transportation referred to in paragraph (14) of this section and the exception therein), under continuing contracts with one person or a limited number of persons either (a) for the furnishing of transportation services through the assignment of motor vehicles for a continuing period of time to the exclusive use of each person served or (b) for the furnishing of transportation services designed to meet the distinct need of each individual customer."

Section 209(a)(1) provides as follows:

"Except as otherwise provided in this section and in section 310a, no person shall engage in the business of a contract carrier by motor vehicle in interstate or foreign commerce on any public high-

way or within any reservation under the exclusive jurisdiction of the United States unless there is in force with respect to such carrier a permit issued by the Commission, authorizing such person to engage in such business: *Provided*, That, subject to section 310 of this title, if any such carrier or a predecessor in interest was in bona fide operation as a contract carrier by motor vehicle on July 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time, or, if engaged in furnishing seasonal service, only, was in bona fide operation on July 1, 1935, during the season ordinarily covered by its operations, except in either instance as to interruptions of service over which the applicant or its predecessor in interest had no control, the Commission shall issue such permit, without further proceedings, if application for such permit was made to the Commission as provided in subsection (b) of this section and within one hundred and twenty days after October 1, 1935, and if such carrier was registered on July 1, 1935, under any code of fair competition requiring registration, the fact of registration shall be evidence of bona fide operation to be considered in connection with the issuance of such permit. Otherwise the application for such permit shall be decided in accordance with the procedure provided for in subsection (b) of this section and such permit shall be issued or denied accordingly. Pending determination of any such application the continuance of such operation shall be lawful. Any person, not included within the foregoing provisions of this paragraph, who or which is engaged in transportation as a contract carrier by motor vehicle when this section takes

effect, may continue such operation for a period of one hundred and twenty days thereafter without a permit and, if application for such permit is made within such period, the carrier may, under such regulations as the Commission shall prescribe, continue such operation until otherwise ordered by the Commission: *Provided further*, That nothing in this chapter shall be construed to repeal, amend, or otherwise modify any Act or Acts relating to national parks and national monuments under the administrative jurisdiction of the Secretary of the Interior, or to withdraw such authority or control as may by law be held by the Secretary of the Interior with respect to the admission and operation of motor vehicles in any national park or national monument of the United States."

Section 203(a)(17) defines private carrier of property by motor vehicles as follows:

"The term 'private carrier of property by motor vehicle' means any person not included in the terms 'common carrier by motor vehicle' or 'contract carrier by motor vehicle', who, or which transports in interstate or foreign commerce by motor vehicle property of which such person is the owner, lessee, or bailee, when such transportation is for the purpose of sale, lease, rent, or bailment, or in furtherance of any commercial enterprise."

The facts in United States v. Drum as set forth in the opinion were as follows:

"The Company presently owns 26 trailers and 6 tractors. It leases 11 tractors for long-haul use in connection with the trailers which it owns. It is

solely in connection with the 11 leased tractors and the services of their owner-operators that the Commission discerned the provision of for-hire transportation. The leases are for renewable terms of one year, but they are terminable by either party on 30 days' notice. Oklahoma is granted the sole right to control the use of the tractor through drivers employed by it; in return, it covenants that such use will be lawful and will be confined to the transportation of the Company's property. Oklahoma pays for its use of the tractors strictly on a mileage basis. The owner receives weekly rental payments of 10 or 11 cents for each mile the vehicle is driven, plus an extra 3 cents per mile on the backhaul if there is a load of raw materials. Oklahoma does not guarantee any minimum mileage. Operating costs—including gasoline, oil, grease, parts, and registration fees—are paid by the owners. Oklahoma assumes no responsibility for wear and tear or damage to the tractors, nor does it provide collision or fire and theft insurance coverage—although it does pay for public liability and property damage insurance. The owners assume no responsibility to Oklahoma for damage to the cargoes.

"Under the collective agreement covering the drivers among its employees, the drivers enjoy certain common employment privileges such as collective bargaining, seniority rights, death benefits, immunity from discharge except for cause, military-service protection, and vacation pay in an amount based on their average weekly pay. Owner-drivers may be discharged for cause. Their remuneration is calculated strictly on a mileage basis, and they are obliged to pay their own living expenses while

on the road. No minimum weekly pay or mileage is guaranteed. Drivers are required to maintain their trucks in good running condition at all times.

"Oklahoma's actual operations were a generally faithful reflection of the leases and the collective agreement. Certain matters, not explicitly or unambiguously covered by the written instruments, are of significance. Ordinarily the drivers were assigned to their own tractors, though there were occasional exceptions. Oklahoma's truck superintendent testified that the owner-operators' services were not utilized each day. The owners were required to pay for all repairs, though Oklahoma conducted safety inspections. The Company closely directed all details of loading and delivery routes. It instructed the drivers as to steps to be taken in emergencies. It administered physical examinations, supervised the preparation of reports required by the Interstate Commerce Commission, paid social security taxes and withheld income taxes, and provided workmen's compensation.

"In sum, Oklahoma's operation possessed a number of the hallmarks of a genuine lease of equipment and a genuine employment arrangement.

"Still, the Company was able to spare itself and pass to the owner-operators certain characteristic burdens of the transportation business. The large capital investment in the tractors and the risk of their premature depreciation or catastrophic loss, was borne by the owner-operators, not by the Company. The owner-operators, rather than Oklahoma, stood the risk of a rise in variable costs such as fuel, repairs and maintenance of the tractors in good operating condition, and living expenses, although the thirty-day cancellation privilege, taken

> together with the possible bargaining power of the owner-operators *en bloc*, may have affected the degree to which that burden was actually shifted. Finally, Oklahoma was able to divest itself, to a significant extent, of the risk of non-utilization of high-priced equipment. The owner-operators received neither rental payments nor wages when their tractors were not used and they did not drive. Oklahoma did, however, carry the risk of a non-productive backhaul" (pp. 377-380).

The issue in the *Drum* case was narrowly delineated as follows:

> "The question before the Commission was whether, under these particular facts, Oklahoma had so far emancipated itself from the burdens of transportation that to permit it, on such terms, to secure a transportation service from these unlicensed owner-operators would be inconsistent with the statutory scheme."

In speaking of the tests which determined the ultimate question here involved, the court wrote:

> "But a finding of shipper control does not require a resolution of the ultimate issue in the shipper's favor. It is true that until recently, 'control' has been at the focus of the Commission's efforts to delineate verbally the permissible area of non-licensed leases of transportation equipment. The initial technique of the Commission was to assess the lessee-shipper's assumption of the burdens of transportation in terms of the degree to which he undertook to 'control' or 'dominate' it. The interest in 'control' in turn generated an interest in

whether the drivers of leased equipment were in substance treated as the shipper's employees. Throughout, however, Commission reports have taken note of various factors which clearly transcend any narrow concept of physical direction of the details of the operation; and it has always been apparent that the vesting of such physical 'control' in the shipper would not in itself suffice to render the transportation private carriage.

"Latterly, the Commission has begun to move away from 'control' as the verbal embodiment of its manifold inquiry. The Commission thus accords explicit recognition to a premise which has long been implicit in its decisions: That some indicia of private carriage may be assumed, and detailed surveillance of operations undertaken, without a shipper's having significantly shouldered the burdens of transportation. The test of substance with which the Commission supplemented its 'control' inquiry in this case thus betokens no heedless departure from the beaten track of administrative decision which might occasion a judicial curb upon the exercise of administrative discretion. No more so does the inclusion in the arrangement between Oklahoma and its owner-drivers of a number of particulars also discoverable in arrangements found to constitute private carriage in earlier Commission decisions. We deal in totalities; indicia are instruments of decision, not touchstones. The Commission allowably dealt with this novel situation as an integral and unique problem in judgment, rather than simply as an exercise in counting commonplaces. Nor did it leave the basis for its decision unarticulated" (Notes omitted; pp. 382-384).

On this basis the court concluded that the determination of the district court must be reversed and the determination of the Commission upheld.

The basic facts in the case now before this court at the present time are not markedly different from those in United States v. Drum. There is apparently no dispute in respect to the Commission's findings as to the truck leasing arrangements here involved. It is the conclusions with which the plaintiff differs.

The Commission herein found that compensation for the lease of the trucks is based on a flat amount plus a mileage charge (Report, p. 4; Transcript, p. 381). Plaintiff maintains garage and repair facilities at points throughout the New York City area, where, except for road emergencies, it performs all maintenance and repairs on the equipment (Report, pp. 4, 5). Most of the truck leases provided for garage storage by plaintiff (Report, p. 4). Public liability and property damage insurance for all vehicles is provided by plaintiff (Report, p. 5). Normally, particular vehicles are assigned to a specific shipper lessee by plaintiff, but if a vehicle becomes disabled, plaintiff provides a substitute vehicle (Report, p. 5; Transcript, p. 371).

Where equipment is leased with a driver provided by plaintiff, he provides a complete payroll service. The lessee is furnished a weekly statement showing the rental charge for the equipment plus the direct labor costs such as driver wage, fringe benefits, social security, unemployment insurance, workmen's compensation, taxes, pension and welfare contributions. Plaintiff pays the drivers (Report, p. 4).

It further appears that the purpose of plaintiff's application is to relieve shipper lessees operating beyond the Commercial Zone of the responsibility of carrying drivers on their payrolls. The witness Martin E. Coughlin of

Thomas J. Lipton, Inc. testified in effect that Lipton preferred the Casale payroll service so as to relieve Lipton's payroll department of the burden of preparing payroll checks for one driver who has entirely different fringe benefits, working conditions, wage scales, etc. than other Lipton employees. Similar testimony was given by the witness Rodney W. Burton of Jones and Laughlin Steel Company.

Although the plaintiff contends that the shipper-lessees exercise direction and control over the details of the transportation operation, the Supreme Court in United States v. Drum, supra, has expressly affirmed the Commission's consistent position that such control is not incompatible with for-hire carriage and falls far short of establishing that the shipper-lessees are engaged in private carriage. Quite properly, therefore, the Commission as it now appears in the present case rejected the plaintiff's argument, saying (Report, pp. 12-13):

> "It is true that in such matters as the loading of vehicles, scheduling of departures, and routing of traffic the lessees exercise complete control. But we do not attribute to this the all-important significance which applicant does. The lessees' control in this respect must be considered from the standpoint of the control which a shipper using for-hire carriage exercises over its traffic. It is not at all unusual for shippers to oversee the loading, arrange the departure, and even select the route over which the vehicle is to move. Carriers engaged in for-hire transportation perform a service which to a considerable degree is tailored to the shippers' requirements. So considered, we do not believe that the lessees' control over the physical transportation is so different as to warrant a finding that it is engaged in bona fide private carrier transportation."

Consequently, the Commission in reaching its determination that this was for-hire carriage did not rely entirely on the "control" test but looked at the totalities of the situation.

The plaintiff has suggested that this court remand this matter to the Commission for further study in light of United States v. Drum. In view of the facts in this case and the decision in Drum, we see no purpose to be served by such a remand.

As stated by Follmer, District Judge, in Edwards Motor Transit Company v. United States, D. C. N. D. Penn. 1962, 201 F. Supp. 918, 920:

> "The jurisdiction conferred upon three-judge statutory district courts to review orders of the [Interstate Commerce] Commission is very definitely circumscribed. If an order of the Commission lies within the scope of a statute which the Commission is authorized to administer and enforce, and if the order is based upon adequate findings, which in turn are supported by substantial evidence, the order may not be set aside by a court on review even though the court might disagree with the Commission's conclusions or might consider them contrary to the weight of the evidence."

We are forced to conclude that the Commission acted within its statutory authority, that rational bases for its conclusion and order exist. Consequently, the complaint must be dismissed.

RICHARD H. LEVET
United States District Judge

Dated: New York, N. Y.
April 19, 1962

APPENDIX B

INTERSTATE COMMERCE COMMISSION

No. MC-20314 (Sub-No. 1)

JOHN J. CASALE, INC., CONTRACT CARRIER APPLICATION

DECIDED AUGUST 21, 1961.

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1. Applicant's proposal to lease vehicles with drivers to lessees for operation beyond the New York, N. Y., commercial zone found to constitute for-hire carriage for which appropriate authority is required from the Commission, and not bona fide private carriage of the lessee. Motion to dismiss denied.
2. Proposed operation found to be that of a common carrier.
3. Public convenience and necessity found not shown to require operation by applicant, in interstate or foreign commerce, as a common carrier by motor vehicle, over irregular routes, of general commodities, with exceptions, between New York, N. Y., and points in specified portions of Connecticut, New Jersey, New York, and Pennsylvania. Application denied.

HERBERT BURSTEIN, WENDELL Y. BLANNING and ARTHUR LIBERSTEIN for applicant.

EDWIN A. GEHRING, WILLIAM D. TRAUB, ISAIDORE H. SCHWARTZ, JAMES H. BOOSER, MORTON E. KIEL, DAVID A. MALAT, IRVING KLEIN, JOHN P. TYNAN, EDWARD L. NEHEZ and JOHN M. ZACHARA for protestants.

R. EDWIN BRADY and ALBERT B. ROSENBAUM for intervener in opposition to the application.

REPORT OF THE COMMISSION

DIVISION 1, COMMISSIONERS WALRATH, WEBB, AND TUCKER

TUCKER, COMMISSIONER:

Exceptions to the order recommended by the examiner were filed by applicant, and intervener and a certain protestant replied. Our conclusions differ somewhat from those recommended.

By application filed May 24, 1960, as amended, John J. Casale, Incorporated, New York, N. Y., seeks a permit authorizing operation in interstate or foreign commerce as a contract carrier by motor vehicle, over irregular routes, of general commodities, except those of unusual value, Classes A and B explosives, commodities in bulk, and those injurious or contaminating to other lading, between New York, N. Y., and points in that part of New Jersey north of U. S. Highway 30; points in Nassau, Suffolk, Westchester, Rockland, Ulster, Dutchess and Orange Counties, N. Y.; points in that part of Connecticut west of the Connecticut River; and points in Philadelphia, Delaware, Bucks, Lehigh, Northampton, Pike and Wayne Counties, Pa.

Following the presentation of applicant's witnesses, counsel moved to dismiss the application on the ground that the furnishing of vehicles and drivers, under the cir-

cumstances outlined in the record, constitutes private carriage by the lessee and therefore it is not subject to the Commission's jurisdiction. In the event the Commission finds that the applicant is engaged in for-hire transportation, then we are asked to grant contract carrier authority. Twenty-eight motor carriers and the Joint Northeastern Motor Carriers Association, Inc., oppose the application. The Regular Common Carrier Conference of American Trucking Associations, Inc., intervened in opposition to applicant's motion to dismiss the application.

The principal issue in this proceeding is whether the leasing of vehicles, with drivers who would be employees of applicant, to a lessee for operation beyond the New York commercial zone constitutes for-hire carriage subject to regulation by the Commission. In a prior proceeding[1] involving this applicant the Commission found that the lease of vehicles with drivers on interstate shipments constituted contract carriage. Applicant, however, declined to accept a contract carrier permit. It states that the leasing practices now in effect, hereinafter discussed, show that applicant does not and will not engage in for-hire transportation.

The examiner denied the motion to dismiss as well as the application, finding, in effect, that both the proposed operation where applicant would furnish the vehicle and employ the driver, and the existing operation, constitute for-hire transportation. Applicant excepts to the conclusion of the examiner. Replies were filed by protestant Fowler & Williams, Inc., hereinafter called Fowler, and the intervener, with the latter limiting itself to answering

[1] *John J. Casale Inc., Contract Carrier Application*, 31 M. C. C. 845, 44 M. C. C. 45, 46 M. C. C. 255, and 49 M. C. C. 15.

applicant's exception to the recommended denial of the motion to dismis

The evidence adduced, the examiner's recommendation, the exceptions and the replies have been considered. We adopt the examiner's statement of facts except as they may require modification in light of the exceptions. Before discussing the exceptions we shall briefly describe applicant's leasing operations and the legal principles determinative of the issues in this proceeding.

Applicant holds no authority from the Commission, and is not affiliated with any motor carrier. It leases vehicles for periods ranging from two to five years to approximately 100 lessees for operation within the New York commercial zone and beyond. Two arrangements are offered: (1) the leasing of vehicles without drivers for operation within the commercial zone or beyond; and (2) the leasing of vehicles with drivers on applicant's payroll for operations confined to the New York commercial zone. As of September 1, 1960 it owned 918 motor vehicle units, of which 814 are suitable for handling all types of freight. All vehicles are painted in accordance with the individual lessee's specifications and bear the lessee's name. Applicant maintains garage and repair facilities at points throughout the New York City area, where most of its equipment, whether leased with or without drivers, are serviced and maintained. Compensation for the lease of equipment is based on a flat amount plus a mileage charge. Where equipment is leased with a driver provided by applicant, the lessee is furnished a weekly statement showing the rental charge for the equipment plus the direct labor costs such as driver wages, fringe benefits, social security, unemployment insurance, workmen's compensation, taxes, pension and

welfare contributions. Applicant itself, however, pays the drivers.

The drivers belong to various local unions of the International Brotherhood of Teamsters. Applicant executes and signs collective bargaining agreements as the agent for the lessee. Separate agreements are arranged for each lessee. Agreements are not signed by applicant until it receives the lessee's approval with respect to the particular driver and the terms of the contract. Union agreements expire upon termination of the lease agreement, whereupon the drivers become either employees of the lessee or employees of the concern which is to provide equipment for use of applicant's former lessee. The drivers are not switched among lessees, except in emergencies where an idle driver might be used on another account under the same union jurisdiction.

Most of the truck leases provide for garage storage by applicant, though in some instances vehicles are garaged on the lessee's premises, even though drivers are furnished by applicant. In the latter situation, the time clocks are punched on lessee's premises by the drivers, and each week the punch cards are given to applicant for the preparation of wage checks for drivers and invoices for lessees. Where vehicles leased with drivers paid by lessees are garaged at applicant's facilities, the drivers are required to punch a time clock thereat daily, and the time cards are sent to the lessees at the end of each week. The payroll and checks are prepared by lessee. Applicant keeps a record of each driver, whether on its own payroll or that of the lessee. Except for road emergencies, all maintenance and repairs are performed in applicant's garages and shops. Normally, particular vehicles are assigned to a specific lessee, but when a vehicle becomes disabled, applicant provides substitute vehicles from its

pool. Public liability and property damage insurance for all vehicles are provided by applicant.

Both applicant and the intervener are in agreement on the applicable law. In *H. B. Church Truck Service Co. Com. Car. Application*, 27 M. C. C. 191, cognizant that the facts involving particular leasing operations are peculiarly within the knowledge of the parties thereto, former Division 5 held that where a driver is in the employ of the lessor, this fact creates a rebuttable presumption that the lessor is engaged in for-hire carriage. This presumption has been affirmed in many subsequent Commission and court cases. The *Church* case stresses examination of the question of private versus for-hire carriage in light of all the facts and circumstances surrounding the arrangement. The examination frequently focuses on the two significant instrumentalities of commerce with respect to motor carriage (1) the equipment by which the transportation is accomplished and (2) the driver thereof. *Pacific Diesel Rental Co.—Investigation of Operations*, 78 M. C. C. 161, 173. The *Church* case presumption has recently been restated in *Williams—Investigation of Operations*, 83 M. C. C. 45, 54. The Commission therein said:

> In cases in which the question of the status created by a lease of equipment *with* drivers by a person (or persons acting in concert) to a shipper is presented, in the absence of a showing to the contrary, the presumption arises that the transportation is performed by such person (or persons) as a carrier for compensation; in other words that it is for-hire transportation and as such is subject to regulation. [Emphasis supplied.]

In view of the agreement of the parties on the applicable law, the only question is whether the applicant

has overcome the presumption which the *Church* case requires it to overcome.

The examiner found that the lease of vehicles with drivers for operation beyond the New York Commercial Zone, as proposed, and the present practice in connection with the same operation where the only relation between the lessee and the driver is that the latter is on the former's payroll, constitutes for-hire carriage by the applicant. This finding was reached following consideration of the question of whether applicant or lessee controlled the transportation service.

In its exceptions applicant contends that the drivers, whether on lessees' or on its payroll are in fact employees of the former. It refers to numerous facts of record which are said to indicate that in operations beyond the commercial zone, the driver as well as the transportation service is controlled by the lessee regardless of who employs the driver. Applicant also denies that it leases vehicles with drivers employed by it for operations beyond the commercial zone, stating that the purpose of the filing of this application was to secure a determination that it could employ drivers on vehicles which it leases. In support of the above statement it refers to the arrangement with Trunz Inc. Prior to January 1930 this Company operated its own vehicles. In January of that year, however, it commenced leasing equipment from applicant and employed as drivers the same people as had formerly handled its private carriage operation. Illustrative of the situation where drivers even though on applicant's payroll are said to be in fact employees of the lessee, is the Sears-Roebuck account. Thus, when Sears began leasing equipment from applicant in 1936, the same drivers, who up to that time had been handling equipment leased from one Mitchell,

continued as drivers on equipment which Sears leased from applicant. On termination of the account, these same employees became employees of another truck leasing firm which obtained the Sears account.

Applicant further states that even in situations where drivers are its employees and on its payroll, they are assigned to a particular account and do not continue as applicant's employees if the account is lost. Driver seniority is not based on applicant's company-wide operations, but separately for each individual lessee.

Objection is raised to the examiner's statement that applicant signed the collective bargaining agreements as employer of the drivers used in operating leased vehicles. These agreements are signed "John J. Casale, Inc., for trucks lease to (name of lessee)." Some lessees with drivers on their payroll execute their own labor agreements and applicant does not even appear as the agent. Exception is taken to the examiner's intimation that drivers on the lessees' payroll are employees of applicant because the latter conducts the initial employment interview. In connection with most of its leasing accounts, applicant endeavors to arrange for the furnishing of drivers. It contacts the appropriate union official and asks for drivers. It does the initial interviewing and checks the references or relies on the union endorsement. If the driver is found to be physically fit he is sent to the lessee who determines whether he should be hired. In some instances of record the lessee does its own hiring by contacting the union hall direct.

Applicant emphasizes that the drivers assigned to one lessee may not be used by applicant to serve other lessees, except in emergencies where drivers may be switched from the account of one lessee to the account of another but only if both lessees are in the jurisdiction

of the same union. If a particular lessee's requirements are not as great as expected the driver assigned to that lessee will not work.

Applicant also excepts to the finding that it retains control over the transportation service except for the selection of delivery points. It argues that the lessee has the exclusive right to direct and control the drivers in the operation of the leased equipment. The record indicates that the lessee routes the shipments and schedules deliveries, with applicant never knowing the location of the equipment. From the time the drivers leave applicant's garage, they receive no instructions from applicant regarding delivery assignments.

As further evidence that the complete transportation service is under the control of the lessee, applicant points out that certain transportation costs arising from the operation of the leased vehicles are borne by the lessee. Thus all permits and licenses required for the use and operation of the vehicles are obtained and paid for by the lessee. It must reimburse applicant for any fines imposed for overloading the vehicles. It is responsible for fines arising from driving infractions regardless of whether the driver is on its or the applicant's payroll. The cost of cargo insurance is borne by the lessee. Driver wages and fringe benefits are incurred by the lessee even when the driver is on applicant's payroll.

In summary applicant submits that under existing practices the lessee controls and is responsible for the transportation service to the same extent as it would if it were the owner of the equipment, regardless of whether the drivers are employees of the lessee or employees of the applicant. Applicant contends that since control of the drivers and the transportation service is in the lessees there is no reason why it may not directly employ the driver.

Determination of the real relationship between applicant, the lessees and the drivers is difficult in cases of this type because so much depends on the actual understanding of the parties as to their respective obligations and the way the arrangement is to work. The record shows that many of the lessees leased vehicles and drivers from applicant before the Commission's decision in the prior proceeding. Following that decision, certain of the lessees agreed to take on as employees those of applicant's drivers that had been serving them. The record indicates that applicant believes that the lessees would prefer to be relieved of the responsibility of carrying drivers on their payroll. We are justified in assuming that the arrangement herein proposed would accomplish this purpose, that is, it will relieve the lessees of any real responsibility as employers over their drivers.

Applicant is not convincing when it argues that a driver who at one time was in the employ and on the payroll of one truck leasing firm, then later an employee of applicant, and still later an employee of another truck leasing firm, while all the time serving the same lessee, was nevertheless under the control of the lessee for the entire period. Continuity in serving a particular lessee is not a substitute for the employer-employee relationship. That a driver does not continue in applicant's employ when the account which he serves lapses does not establish that the driver was an employee and subject to the control of the lessee. It is not unusual for companies engaged in rendering service to clients to discharge employees when a particular account is lost. The fact that an employee may subsequently be hired by the same concern whose account he formerly handled does not mean that he was all along an employee and under the control of that concern. We conclude that evidence disclosing that drivers are shifted from one

vehicle leasing firm to another, or from a vehicle leasing firm to the employ and payroll of the lessee, or vice versa, while all the time providing service to the same lessee, is not incompatible with the finding that the driver is not subject to the control of the lessee for the periods when he is not a bona fide employee and on the payroll of the lessees.

The record indicates that applicant is a significant factor in the procurement of drivers for the lessees. Its experience in labor recruitment and labor relationships is acknowledged by the lessees. In many cases it makes the initial contact with the union; arranges and conducts the initial interview with the driver; checks the results of the medical examination; and, lastly, sends the driver to the lessee who does the actual hiring. The mere recital of the steps followed in the hiring of drivers is a weak substitute for applicant's long experience and the common understanding between it and the lessees in these matters.

In proposing that it be allowed to furnish the drivers and occupy the role of employer and paymaster, applicant would assume, in relation to the drivers, a position and status that we can not ignore. Considering that most of the drivers pick up their vehicles at applicant's garage, punch a time clock on arrival in the morning and on departure in the evening, that the employment and payroll records would be maintained by applicant, and that it would pay the drivers, we conclude that applicant would be the one who exercises control over the driver for the purpose of determining whether a for-hire transportation service would be rendered. Under such an arrangement the lessee would exercise no control over the drivers except to the approximate degree of many shippers utilizing for-hire transportation service.

On being relieved of the burden of managing their drivers the lessees' only control would be in the initial selection.

Coupling the above with the fact that applicant will furnish and maintain the vehicles, we concluded that applicant has not overcome the presumption that one who furnishes vehicles and drivers is engaged in performing a for-hire service.

It is true that in such matters as the loading of vehicles, scheduling of departures, and routing of traffic the lessees exercise complete control. But we do not attribute to this the all-important significance which applicant does. The lessees' control in this respect must be considered from the standpoint of the control which a shipper using for-hire carriage exercises over its traffic. It is not at all unusual for shippers to oversee the loading, arrange the departure, and even select the route over which the vehicle is to move. Carriers engaged in for-hire transportation perform a service which to a considerable degree is tailored to the shippers' requirements. So considered, we do not believe that the lessees' control over the physical transportation is so different as to warrant a finding that it is engaged in bona fide private carrier transportation. Although the lessees control the physical transportation, we must look at the total situation. The overall operation here revealed is the provision of a comprehensive motor carrier service to shippers for compensation. We therefore conclude that the operation would be that of applicant, and would constitute for-hire carriage.

There remains for consideration the question of whether the authority sought should be granted. Eight shippers support the application. As pertinent here, a manufacturer and distributor of foodstuffs ships its

products from a facility at Hoboken, N. J., to the New England States, New York, New Jersey and eastern Pennsylvania. More than 95 percent of the transportation needs of its Hoboken facility are satisfactorily served by existing rail and motor carriers, the remainder being transported in four vehicles leased from applicant. Three are utilized exclusively within the New York commercial zone, and the other operates between Hoboken and Albian, N. Y., Suffolk, Va., Hartford, Conn., Cambridge and Medford, Mass. It prefers to let applicant administer each driver's payroll, and does not anticipate diverting any traffic from existing carriers.

A steel company leases eight trucks with drivers from applicant for use at its Brooklyn, N. Y., and Hoboken shipyards. Such vehicles are used within and between its three yards. The proposed service would be used for emergency shipments of parts from shipper's plant at Sparrows Point, Md., and other plants to its three yards, and from its yards to ports where ships are being repaired. Common carriers and contract carriers are used in shipper's other operations. Existing carriers are presently used in the involved territory, and a grant herein might result in a diversion of a very small amount of traffic from them.

A retail steel company desires a motor carrier service in the involved territory which would permit shipper to retain complete control over the vehicles used. It leases six vehicles without drivers from applicant, and operates such vehicles from its warehouses in New York City in the transportation of small shipments primarily in the New York commercial zone and within 50 miles thereof. It selects its drivers on the recommendation of applicant and signs its own union contract therefor, however, it prefers applicant to furnish drivers. It utilizes common carriers on movements to distant points.

Five shippers located in New York City lease varying numbers of vehicles from applicant without drivers because a small portion of their traffic moves to points beyond the New York commercial zone. They employ their own drivers but prefer to lease trucks with drivers to avoid preparing payrolls. All use common carriers to some extent on movements to points beyond the New York commercial zone.

Three protestants presented evidence in opposition to the application. All desire to handle the traffic under consideration within the scope of their respective authorities, operate considerable equipment suitable for the involved traffic, and maintain terminals in the involved territory. As here pertinent, Boyle Brothers, Inc., hereinafter called Boyle, holds common carrier authority to transport general commodities, with exceptions, between New York City on the one hand, and, on the other, specified points in the involved portion of New Jersey. Associated Transport holds common carrier authority to transport general commodities, over specified routes, within the involved territory. Fowler holds common carrier authority to transport general commodities, with the usual exceptions, over regular and irregular routes, between New York City and points in Wayne and Pike Counties by tacking, and, over irregular routes between specified northern counties of New Jersey, on the one hand, and, on the other, points in Wayne and Pike Counties. It also has interline arrangements with unnamed motor carriers on movements to points in Connecticut.

It is clear that the proposed operations do not conform to those of a contract carrier as defined in section 203(a)(15) of the Interstate Commerce Act. Clearly, applicant prefers to hold itself out to perform transportation service for any shipper willing to enter into appropriate arrangements. It would not confine its opera-

tions to a limited number of shippers as required of the act. We conclude, therefore, that the proposed operations are those of a common carrier.

Part of applicant's burden is to show that there is a substantial need for the proposed service which the numerous existing carriers operating in the territory are unable or unwilling to meet. Generally existing carriers have the right to transport all the traffic they can adequately and efficiently handle. The evidence of record does not indicate that existing carriers are unable or unwilling to provide a transportation service responsive to the needs of the supporting shippers. Shipper support for applicant is grounded mainly on the desire to be relieved of the responsibility for employing the driver while yet maintaining the long standing relationship with applicant. In light of applicant's failure to show a need for the proposed service, it is not necessary to consider applicant's willingness or fitness properly to perform the proposed service. Accordingly, the application must be denied.

We find that applicant's proposal to lease vehicles and drivers, under the circumstances set forth herein, to lessees for operation beyond the New York commercial zone constitutes the rendering of a for-hire service for which authority from the Commission is required, and is not bona fide private carriage by lessees. The motion to dismiss is denied.

We further find that the proposed operation is that of a common carrier; that applicant has failed to establish that the present or future public convenience and necessity require such operation; and that the application should be denied.

An appropriate order will be entered.

Commissioner Walrath did not participate.

ORDER

At a Session of the Interstate Commerce Commission, Division 1, held at its office in Washington, D. C., on the 21st day of August, A. D. 1961.

No. MC-20314 (Sub-No. 1)

JOHN J. CASALE, INC., CONTRACT CARRIER APPLICATION

Investigation of the matters and things involved in this proceeding having been made, and said division, on the date hereof, having made and filed a report herein containing its findings of fact and conclusions thereon, which report is hereby made a part hereof:

IT IS ORDERED, That said application be, and it is hereby, denied.

By the Commission, division 1.

HAROLD D. McCOY,
(Seal) Secretary.

INDEX

	Page
Statement	1
Argument	5
Conclusion	9

CITATIONS

Cases:

Bridge Auto Renting Corp. v. *Pedrick*, 174 F. 2d 733, certiorari denied, 338 U.S. 850	8
Casale, John J., Inc. v. *United States*, 86 F. Supp. 167, certiorari denied, 338 U.S. 954	8
Commercial Zones and Terminal Areas, 54 M.C.C. 21	2
Schenley Distillers Corp. v. *United States*, 326 U.S. 432	3
United States v. *Drum*, 368 U.S. 370	2, 5, 6, 7, 8

Statute:

Interstate Commerce Act, Section 203(b)(8), 49 U.S.C. 203(b)(8)	2

In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 483

JOHN J. CASALE, INC., APPELLANT

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION TO AFFIRM

Pursuant to Rule 16, paragraph 1(c), of the Revised Rules of this Court, the United States of America and Interstate Commerce Commission move that the judgment of the district court be affirmed.

STATEMENT

Appellant seeks review of the final judgment of a three-judge district court (J.S. 21-31) dismissing its suit to set aside a decision of the Interstate Commerce Commission. The Commission held that apellant's proposed leasing of motor vehicles, with drivers, for operation beyond the New York City Commercial Zone would constitute for-hire carriage subject to Com-

mission regulation, rather than the mere provision of equipment to the shippers as private carriers (for which no operating authority is required). Applying this Court's holding in *United States* v. *Drum*, 368 U.S. 370, the district court upheld the Commission on the grounds that, in determining the character of the proposed operation, the Commission properly "looked at the totalities of the situation" and that its determination was supported by the undisputed facts of record (J.S. 29-31).

Appellant is engaged in the business of leasing motor vehicles to shippers of many different commodities in the New York City area. At present, appellant leases vehicles without drivers for operation within and beyond the so-called New York City Commercial Zone, and with drivers (who are on appellant's payroll) for operations within the Zone.[1] It seeks to enlarge its service and provide the latter type of operation outside the Zone—that is, appellant would furnish vehicles along with drivers who would be its employees. To test the Commission's authority over this proposed operation, appellant applied for a contract carrier permit to operate in the proposed manner beyond the Zone, and during the course of the proceeding moved to dismiss its application on the ground that it proposed merely the provision of vehicles and drivers

[1] Motor vehicle transportation within a commercial zone is given a limited exemption from regulation by the Commission under Section 203(b)(8) of the Interstate Commerce Act, 49 U.S.C. 303(b)(8). The New York City Commercial Zone was defined by the Commission in *Commercial Zones and Terminal Areas*, 54 M.C.C. 21, 90-92.

for use in private carriage beyond the Zone, a service not subject to the jurisdiction of the Commission.[2]

The Commission found that appellant owns and leases 918 motor vehicle units. It maintains garage and repair facilities at various points in the New York City area where most of its equipment is serviced and maintained, regardless of whether the vehicles are leased with or without drivers (J.S. 35). All maintenance and repairs are performed in appellant's garages and shops, except for road emergencies (J.S. 36). When a vehicle is disabled, appellant provides substitute vehicles from its pool of motor trucks. It maintains public liability and property damage insurance for all vehicles (J.S. 36-37).

When appellant presently furnishes drivers with vehicles in the New York Commercial Zone, as proposed in its application in this case for operations outside the Zone, appellant itself directly employs the drivers (subject to the particular lessee's approval) and pays them, although lessees receive weekly statements from appellant showing the various charges and expenses that are due; in paying for driver services, the lessees indirectly bear the cost of wages, taxes, insurance, etc. (J.S. 35-36).[3] Appellant provides ga-

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[2] A motion to dismiss one's own application is an accepted method of securing a determination of the status of transportation operations. See, *e.g.*, *Schenley Distillers Corp.* v. *United States*, 326 U.S. 432, 436.

[3] In the present operations outside the New York City Commercial Zone, vehicles leased by appellant are driven by employees of the lessees. However, it was found that, even in that situation, appellant would furnish the drivers to be hired by the lessees. Appellant

rage storage for the vehicles under most leases, and drivers employed by it for leased vehicles punch a time clock at its garage. When the vehicles are garaged by lessees and the drivers paid by appellant, the drivers punch time clocks on the premises of the lessees, who submit the cards to appellant weekly for preparation of the wage checks for drivers and invoices for lessees. The Commission also found that appellant keeps the employment and payroll records of each driver, whether on its own payroll or that of a lessee (J.S. 36, 42). While drivers employed by appellant are assigned to particular lessee accounts, in emergencies appellant will switch drivers among those lessees which are under the same union jurisdiction (J.S. 36).

The Commission found that the proposed arrangement was designed to, and would, "relieve the lessees of any real responsibility as employers over their drivers" (J.S. 41). It also found that "for the purpose of determining whether a for-hire transportation service would be rendered," appellant "would be the one who exercises control over the driver" and the lessees' control would be no more than that exercised by "many

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would contact the appropriate union official and ask for drivers, arrange and conduct the initial interview; check the drivers' references (unless it chose to rely on the union endorsement); check the results of a medical examination; and, if the driver be found physically fit, only then send the driver to the lessee, who would make the final decision to sign him up as an employee (J.S. 39, 42). On the basis of this and other evidence, the examiner found that the *present* operations outside the Zone—as well as the proposed service—constituted "for-hire carriage" requiring certification (J.S. 38). The Commission made no finding about the present operations, and there was no such issue in the court proceeding.

shippers utilizing for-hire transportation service" (J.S. 42). Even though lessees under the proposed operation would (not unlike shippers patronizing regulated carriers), retain control over the "physical transportation" performed with the leased vehicles, including the loading of vehicles, scheduling of departures, and routing of traffic, such control did not require a conclusion that the lessees were engaged in private carriage (J.S. 42-43). Rather, the Commission looked beyond the question of transportation control and evaluated the "total situation" presented by the proposed service (J.S. 43). The Commission concluded (*ibid.*):

> The overall operation here revealed is the provision of a comprehensive motor carrier service to shippers for compensation. We therefore conclude that the operation would be that of applicant, and would constitute for-hire carriage.[4]

The district court affirmed (J.S. 21-31) on the basis of *United States* v. *Drum*, 368 U.S. 370.

ARGUMENT

This appeal presents no substantial question warranting plenary consideration by this Court. The opinion of the Court in *United States* v. *Drum*, *supra*,

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[4] The Commission, after finding that appellant was required to obtain operating authority to perform the proposed operation, denied the application for such authority (J.S. 43-46). Appellant did not challenge the denial of operating authority in the court below but only the determination that the proposed operation would constitute for-hire carriage (J.S. 5). Only the latter issue is presented by the appeal to this Court (J.S. 3).

settles the applicable law, and, as the court below concluded, the Commission's application of the law to the particular facts of this case was proper.

1. In *United States* v. *Drum*, *supra*, this Court held that, for a transportation service to be classified as private carriage, the shipper must "assume in significant measure the characteristic burdens of the transportation business" (368 U.S. at 375). The Court approved the standards developed by the Commission for determining that issue—*i.e.*, that, while the degree of control exercised by the shipper over the transportation operation is an important factor, the vesting of "physical direction of the details of the operation" in the shipper "would not in itself suffice to render the transportation private carriage" (368 U.S. at 381, 383); the ultimate judgment as to the various factors making up the "burdens of transportation" is one upon "totalities" (368 U.S. at 384).

In the present case, the Commission carefully adhered to the standards approved by this Court in the *Drum* case. Fully analyzing the factual circumstances, the Commission recognized that appellant's lessees would have "control over the physical transportation" involved but concluded that such control would not have "all-important significance" in determining whether the transportation was private or for-hire carriage (J.S. 43). "[W]e must look," the Commission stated, "at the total situation"; and, so doing, it found that the "overall operation" at issue was "the provision of a comprehensive motor carrier service to ship-

pers for compensation"—*i.e.*, for-hire, and not private, carriage (*ibid.*). As the court below succinctly found, "the Commission in reaching its determination that this was for-hire carriage did not rely entirely on the 'control' test but looked at the totalities of the situation" (J.S. 31).[5]

2. In *United States* v. *Drum*, *supra*, this Court concluded that certain financial risks with respect to vehicles were properly considered to be among the "characteristic burdens of the transportation business" so that a shipper's shifting of those risks to individual owner-operators justified a finding of for-hire carriage despite the existence of an employment relationship between the shipper and the owner-operators (368 U.S. at 379, 385). In the present case, appellant contends that there was no showing that any characteristic burdens of transportation would be shifted to appellant from its lessees under the proposed operation; it bases this contention on the assumption that the Court in the *Drum* case limited the content of the phrase "burdens of transportation" to the cost factors involved in that case (see J.S. 11, 13-14). The assumption is erroneous; the Court in the *Drum* case recog-

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[5] Appellant mistakenly contends that "the Court below ruled against the Commission on the control issue" (J.S. 8). However, the court below merely recited appellant's contention that its lessees had "control" over the transportation operations and, citing the *Drum* case, noted that "such control is not incompatible with for-hire carriage and falls far short of establishing that the shipper-lessees are engaged in private carriage" (J.S. 30). The court was simply observing, as the Commission had held (J.S. 43), that this element of "control" is not of "all-important significance" in determining whether transportation is private or for-hire.

nized that the definition of the relevant "burdens" is a task "well within the range of the responsibility Congress assigned the Commission" (368 U.S. at 385).

In this case, as we have noted, the Commission concluded that the appellant proposed to provide "a comprehensive motor carrier service," including the furnishing and maintenance of the necessary equipment, and the procurement and payment of drivers (J.S. 43). The provision of, and the assumption of continuing responsibility for, drivers on a payroll clearly constitutes a burden of organizing and managing a transportation service, cf. *Bridge Auto Renting Corp.* v. *Pedrick*, 174 F.2d 733 (C.A. 2), certiorari denied, 338 U.S. 850; *John J. Casale, Inc.*, v. *United States*, 86 F. Supp. 167 (Ct. Cl.), certiorari denied, 338 U.S. 954, and the Commission found that the arrangement at issue here was intended to, and would in fact, "relieve the lessees of any real responsibility as employers over their drivers" (J.S. 41). The Commission also noted the similarity between appellant's proposed arrangement and the circumstances surrounding the typical arrangement for for-hire carriage (see J.S. 43).[6] We submit that, as in the *Drum* case, the Commission dealt with this situation "as an integral and unique problem

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[6] Appellant argues (J.S. 12-18) that the proposed operation must be exempt from regulation because the only difference between it and appellant's present operations outside the New York City Commercial Zone is that the drivers would be shifted from the lessees' payroll to appellant's payroll. Appellant's argument assumes that its present operations outside of the Zone are legal (*i.e.*, not subject to regulation). The Commission did not adopt that assumption; while the Examiner found appellant's present operations to be illegal (see note 3, pp. 3-4, *supra*), the Commission did not pass on that question

in judgment" (368 U.S. at 384), and that, as the district court found, the uncontroverted basic findings amply suport its exercise of judgment.

CONCLUSION

The appeal presents no substantial issue warranting plenary consideration, and the judgment of the court below should be affirmed.

Respectfully submitted,

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Assistant Attorney General.

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IN THE

Supreme Court of the United States

October Term, 1962

No. 483

JOHN J. CASALE, INC.,

Appellant,

AGAINST

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,

Appellees.

REPLY TO APPELLEES' MOTION TO AFFIRM

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UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,

Appellees.

REPLY TO APPELLEES' MOTION TO AFFIRM

Preliminary Statement

Appellant submits this brief reply to the motion to affirm because the appellees plainly misconceive and misconstrue the nature and content of the opinion of the court below and the Report of the Commission.

1. Appellees state that the district court upheld the Commission because the Commission "looked at the totalities of the situation" in determining the character of appellant's services (M. A. 2, 5, 6),* and reached its decision by following the guidelines provided by *United*

* The symbol "M. A." refers to the motion to affirm followed by the page number.

States v. *Drum*, 368 U. S. 370 (1962). The fact is that the Commission did no such thing. Reference in its report to the "total situation" was restricted to the control issue exclusively (J. S. 43).* The Commission said, in effect, that control of "the physical operation" by lessees of vehicles is not "so different as to warrant a finding that it is engaged in *bona fide* private carrier transportation" when the "total situation", namely, the "over-all operation" is reviewed (J. S. 43). But the district court imported into this simple comment a non-existent finding by the Commission of the "burden of transportation" test when, in fact, there is nothing at all in the Commission's Report which remotely suggests that anything but control was in issue. Appellees incorrectly claim (M. A. 6) that the Commission "carefully adhered to the standards approved by this court in the *Drum* case".

It was the district court which disregarded the instructions against re-writing reports of the Commission and the Appellees happily attached themselves to this safari into an area which the district court, and not the Commission, explored.

Appellees' reliance upon the Commission's conclusion that the Appellant's proposed arrangement would relieve lessees of responsibility for drivers is plainly misplaced (M. A. 4). To begin with, the district court did not adopt this conclusion, but even if it did, the conclusion was designed by the Commission to support the adverse determination on the question of control and not to implement the "burdens of transportation" criterion. In any event, only naivete about the pattern of industrial labor relations can account for this erroneous conclusion about

* The symbol "J. S." refers to the Jurisdictional Statement followed by the page number.

"responsibility as employer". The *fact*, as found by the Commission, was that the labor agreement which covered the employment of drivers and helpers operating leased vehicles was signed by appellant *as agent* for the lessees (J. S. 36) and the employment arrangement, as well as the individual employment agreement, was between the lessee and the driver (*J. I. Case Company* v. *National Labor Relations Board*, 321 U. S. 332 [1944]).

2. The appellees are wrong when they contend that appellant construed this court's decision in *United States* v. *Drum*, *supra*, as limiting "the burdens of transportation" test to cost factors (M. A. 7). Appellant merely recited the text of this court's definition (J. S. 11) to demonstrate that *none* of the elements was considered or discussed by the Commission *in this case*. Moreover, this court did not say that the Commission could, on a case by case basis, define and redefine the phrase "burdens of transportation". But even if it did, the contention is irrelevant because the Commission decided *this case* on the control issue and the district court embarked on its own judicial adventure in upholding the Commission on the basis of the *Drum* case, *supra*.

CONCLUSION

The Motion to Affirm Should Be Denied.

December 3rd, 1962.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1962

No. 483

JOHN J. CASALE, INC.,

Appellant.

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Appellees.

PETITION FOR REHEARING

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OCTOBER TERM, 1962

No. 483

JOHN J. CASALE, INC.,

Appellant,

AGAINST

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,

Appellees.

PETITION FOR REHEARING

John J. Casale, Inc. (herein called "Appellant"), respectfully petitions, pursuant to Rule 58 of the Revised Rules of the Supreme Court of the United States, for a rehearing of the judgment of the Supreme Court entered herein on December 17, 1962, which affirmed the decision of the United States District Court for the Southern District of New York. In support of the petition, Appellant respectfully shows and alleges:

I

This case involved the construction of three important sections of the Interstate Commerce Act (49 U. S. C. Section 303(a)(14), (15) and (17)); called for the resolution of the most crucial issue in the whole area of regulated transportation; and resulted in a subversion of the theory and practice of judicial review. By affirming the judgment, without opinion, the exiguous treatment of the identical issue in *United States* v. *Drum*, 368 U. S. 370

(1962), is rendered even more obscure than it was and is and the paralogism which characterizes the opinion of the Court below is plainly an erroneous gloss on the *Dram* case, *supra*. The affirmance, therefore, expands the reach of *Dram*, *supra*, so that the Interstate Commerce Commission (herein called the "Commission") is given a mandate to legislate standards at will and then to abandon them, secure in the knowledge that if an order is not supported by substantial evidence or grounded upon a proper principle of law, the three judge Court will reach into the judicial grab bag and extract the *Dram* case.

II

A review of this case, as it was heard and decided by the Commission shows that the "burden of transportation" test enunciated in the *Dram* case was never considered. Nevertheless, the Court below capriciously surmised that the Commission must have been guided by the *Dram* case, *supra*. But even if the Commission had the prescience to anticipate the reversal by this Court of the decision of the District Court of Oklahoma in the *Dram* case (193 F. Supp. 275, (1960)) the Commission improperly applied the principles of the case. Appellant did, indeed, meet the "burden of transportation" test as the Commission has defined it since the announcement of the *Dram* decision, *supra*. Thus, in *Verbel Transport, Inc., Investigation and Revocation of Certificate*, M. C. C. ——, 15 Fed. Carr. 35,541 (1962), the Commission held that a shipper was not engaged in private transportation despite the fact that the drivers were its direct employees and were transporting its goods in leased vehicles. The Commission concluded that an employer-employee relationship *per se* does not establish the "exclusive right of controlling the (transportation) operation" by a shipper. The opposite contention was ad

vanced by the Appellant, namely, that the absence of the classic type of employer-employee relationship does not establish *per se* that the shipper does not control the transportation or its essential incidents. The essence of the relationship between the Appellant and its lessees overwhelmingly proved that the lessee controlled the physical aspects of the transportation, the work of the drivers and assumed all of the financial burdens which are part and parcel of private carriage. These essential facts were not reviewed or evaluated by the Commission nor was the Commission accorded an opportunity to do so. If the Commission did rely upon the "burden of transportation" test, then it did not consider the underlying factors thereof and the Court below should have vacated the order and remanded the case to the Commission for consideration and review of the critical factors encompassed by the "burden of transportation" test. By failing to do so, and by this Court's affirmance, the Commission is given an administrative blank check and the law becomes what the Commission elects to say it is. Expertise does not cure constitutional infirmities nor invest administrative agencies with the power to construe statutes into new laws.

III

In affirming the judgment below this Honorable Court departed from settled principles (*United States v. L. A. Tucker Truck Lines, Inc.*, 344 U. S. 33 (1952); *United States v. Pierce Auto Freight Lines*, 327 U. S. 515 (1946); *Florida v. United States*, 282 U. S. 194 (1931)) which instruct that there must be a rational basis for an administrative determination so that its scope and meaning may be known to a reviewing court. If this case was governed by the *Bloom* case, then the self evident failure of the Commission to consider that case shows that there was no

rational basis for the decision and the order could have been sustained only by the wholly erroneous decision of the Court below to thrust the *Dixon* case upon the Commission and for the Court to pretend that the decision by the Commission rested squarely upon *Dixon*. This fictive arrangement makes a mockery of judicial review which this Court should not sanction.

IV

WHEREFORE, Appellant respectfully submits that a rehearing be granted and upon rehearing, jurisdiction should be noted in order that full argument may be had before this Honorable Court.

Respectfully submitted,

HERBERT BURSTEIN,
Attorney for Appellant,
160 Broadway,
New York, New York.

Certificate

I hereby certify that this petition is presented in good faith and not for delay and I further certify that copies of this petition have been served on opposing counsel by depositing same in the United States mail on this the 25th day of February, 1963.

HERBERT BURSTEIN